

In the Matter of the Compensation of  
**JOSE H. PIMENTEL-HURTADO, Claimant**  
WCB Case No. 22-02585  
**ORDER ON REVIEW**  
Dunn & Roy PC, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Ousey, Curey, and Dougherty.

The SAIF Corporation requests review of that portion of Administrative Law Judge (ALJ) Fulsher's order that set aside its denial of claimant's new or omitted medical condition claim for a combined neck osteoarthritis condition. On review, the issue is compensability. We affirm.

**FINDINGS OF FACT**

We adopt the ALJ's "Findings of Fact" with the following summary and supplementation.

On October 11, 2021, claimant injured his neck while lifting a box that weighed approximately 50 pounds. (Ex. 1; Tr. 11).

On October 13, 2021, claimant sought urgent care treatment from Ms. Grisetti, a physician assistant. (Ex. 2-1). Ms. Grisetti diagnosed an acute neck strain, noted severely limited range of movement, and prescribed pain and muscle spasm medications. (Ex. 2-1-2). She restricted claimant from work for the rest of the week. (Ex. 2-1).

Claimant testified that he did not have any problems with his neck before the October 2021 work event. (Tr. 11). He stated that he had never sought medical treatment or missed work because of his neck before the work event. (*Id.*)

On October 20, 2021, Ms. Bell, a nurse practitioner (NP), noted cervical spine pain and tenderness. (Ex. 3-1-2). She diagnosed a cervical strain, ordered an x-ray, and referred claimant to physical therapy. (Ex. 3-2). NP Bell released claimant to light duty. (*Id.*)

On October 29, 2021, SAIF accepted a neck strain. (Ex. 7).

On November 2, 2021, NP Bell noted that the x-ray report identified degenerative disc disease at multiple levels of the cervical spine. (Ex. 9-1). She diagnosed a “cervical strain complicated by moderate osteoarthritis of cervical spine.” (Ex. 9-2). In addition, NP Bell recorded that claimant had denied a history of a neck injury. (Ex. 9-1).

Dr. Johansen, a chiropractor, treated claimant in November and December 2021. (Exs. 14, 16, 17, 19, 20). He noted that claimant had been experiencing consistent neck pain since the October 2021 work event. (Ex. 14-1). In addition, Dr. Johansen noted tenderness, stiffness, and swelling. (Exs. 14-1, 16-1).

Claimant continued to treat with NP Bell in November and December 2021. (Exs. 13, 15, 21, 23). She noted tenderness, stiffness, and reduced range of motion. (Ex. 13-2). She stated that claimant’s range of motion had worsened and that his pain and symptoms remained disabling. (Ex. 23-2). She ordered an MRI. (*Id.*)

A January 2022 MRI report indicated moderate degenerative changes in the cervical spine. (Ex. 25).

On February 28, 2022, Dr. Benz, an orthopedist, examined claimant at SAIF’s request. (Ex. 31). He diagnosed cervical degenerative arthritis and a superimposed cervical strain. (Ex. 31-9). He stated that claimant’s accepted cervical strain was medically stationary and that he had no impairment. (Ex. 31-10).

On March 15, 2022, NP Bell concurred with the medically stationary date and impairment findings in Dr. Benz’s February 2022 report. (Ex. 35).

A March 29, 2022, Notice of Closure awarded temporary disability, but no permanent disability benefits. (Ex. 36-1).

On March 30, 2022, Dr. Johnston, an osteopathic physician, diagnosed a chronic cervical strain. (Ex. 37-2).

On May 13, 2022, Dr. Benz opined that the work event was not a material contributing cause of the disability or need for treatment of claimant’s neck osteoarthritis. (Ex. 42-1). In addition, he stated that claimant’s neck strain was not the major contributing cause of the osteoarthritis. (*Id.*) Dr. Benz concluded that the most likely cause of the osteoarthritis was heredity. (Ex. 42-2).

On May 24, 2022, SAIF denied claimant's new or omitted medical condition claim for a neck osteoarthritis condition. (Ex. 43-1). Claimant requested a hearing. (Ex. 44).

On August 19, 2022, Dr. Johansen stated that claimant had a cervical strain superimposed on symptomatic neck arthritis. (Ex. 45A-2). He opined that the work event likely caused a flare up of claimant's preexisting neck osteoarthritis. (Ex. 45A-1-2). He noted that claimant did not have any neck symptoms before the work injury and that once the injury occurred, his arthritis flared up and was made symptomatic. (Ex. 45A-2). Dr. Johansen concluded that the arthritis "flare up" increased claimant's disability and need for treatment and delayed his recovery. (*Id.*)

In August and September 2022, Dr. Benz and NP Bell opined that claimant's neck osteoarthritis preexisted the work event and that it had developed gradually over the course of years. (Exs. 45-1-2, 46-2). They stated that although the work event may have caused claimant to experience symptoms stemming from the osteoarthritis, the work event would not be the major cause of the osteoarthritis itself or a pathological worsening of that condition. (Exs. 45-2, 46-2).

On September 7, 2022, NP Bell stated that claimant was not progressing in a way that she would expect from a simple cervical strain. (Ex. 47-7). She opined that claimant's arthritis was likely contributing to his lack of progress. (*Id.*) She stated that claimant had a cervical strain complicated by osteoarthritis. (Ex. 47-11-12). NP Bell explained that in November 2021, some of the stiffness, pain, and reduced range of motion was coming from the osteoarthritis, but that the majority of these findings were coming from the strain. (Ex. 47-8). She noted that there was no evidence in the record that claimant's osteoarthritis was causing any symptoms before the work injury. (Ex. 47-8-9). In addition, she opined that the osteoarthritis became symptomatic as a result of the work event. (Ex. 47-11). Finally, considering both the cervical strain and osteoarthritis, NP Bell concluded that the cervical strain was the major contributing cause of claimant's initial need for treatment. (Ex. 47-11-12).

On September 29, 2022, Dr. Benz stated that claimant's cervical strain was superimposed on his preexisting arthritis. (Ex. 48-7-8). He noted that he would have expected the cervical strain to have resolved approximately 8 to 12 weeks after the work injury. (Ex. 48-9). He explained that because the strain had not resolved after 16 weeks, he believed that the primary cause of claimant's symptoms at that time was the preexisting arthritis. (Ex. 48-9). In addition, he

stated that claimant's reduced range of motion was due to the cervical strain for a period of time, but then was due to the arthritis. (Ex. 48-14). Finally, Dr. Benz concluded that claimant's symptoms could have been caused by the cervical strain or arthritis, but that it was difficult, if not impossible, to separate them. (*Id.*)

When discussing the issues before the hearing, claimant's counsel clarified that it was claimant's position that the claimed osteoarthritis condition was a combined condition and that claimant's disability or need for treatment arose out of the combined condition. (Tr. 3, 5). During closing arguments, claimant's counsel argued that claimant's new or omitted medical condition claim was compensable as a combined condition consisting of the previously accepted neck strain and preexisting osteoarthritis. (Tr. 15, 16).

### CONCLUSIONS OF LAW AND OPINION

The ALJ found that the record persuasively established the compensability of a combined condition consisting of the previously accepted neck strain and preexisting osteoarthritis.<sup>1</sup> In reaching that conclusion, the ALJ determined that an injury standard, rather than an occupational disease standard, applied. Accordingly, the ALJ set aside SAIF's denial.

On review, SAIF contends that the claim should be analyzed under an occupational disease standard. In addition, SAIF argues that the record does not establish the existence of a combined condition. Based on the following reasoning, we disagree with SAIF's contentions.

We first determine the appropriate legal standard. *See Dibrito v. SAIF*, 319 Or 344, 248 (1994) (the Board's first task is to determine which provisions of workers' compensation law are applicable); *Kelly Parkhill*, 74 Van Natta 735, 736 (2022). In determining whether a claim is appropriately analyzed as an occupational disease or an injury, we look at whether the onset of the condition

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<sup>1</sup> Claimant contends the ALJ's admission of Exhibits 31, 45, and 48 (Dr. Benz's opinions) was an abuse of discretion because Dr. Benz's opinions were based on an improper legal conclusion. (Ex. 48-9). Specifically, claimant challenges Dr. Benz's statement that strains usually resolve in 8 to 12 weeks and that the primary cause of claimant's symptoms after 16 weeks was preexisting arthritis. (*Id.*) However, we do not interpret this statement to be based on a legal conclusion (improper or otherwise). In fact, Dr. Benz explained that this particular statement was based on the medical literature. (*Id.*) Under such circumstances, we find no abuse of discretion in the ALJ's admission of Exhibits 31, 45, and 48. *See* ORS 656.283(6); *Brown v. SAIF*, 51 Or App 389, 394 (1991) (the ALJ's decision to admit or exclude evidence is limited only by the consideration that the hearing as a whole achieve substantial justice).

itself, not its symptoms, occurred suddenly or gradually. *See Smirnoff v. SAIF*, 118 Or App 438, 443 (2003) (an occupational disease is distinguished from an injury by its gradual onset, whereas an injury arises suddenly due to an identifiable event or has an onset traceable to a discrete period); *Daniel F. Judd*, 71 Van Natta 441, 441 (2019). Additionally, the parties do not dispute that this claim presents a complex medical question that must be resolved by expert medical opinion. *See Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Ariel Fillinger*, 73 Van Natta 730, 731 (2021).

Here, the record supports a conclusion that the combined neck condition arose suddenly after the October 2021 work event. Specifically, claimant had not had any problems with his neck or sought medical treatment for his neck before the work event. (Exs. 45A-2, 47-8-9; Tr. 11). After the work event, initial treatment records documented an acute neck strain, severely limited range of motion, consistent neck pain, tenderness, stiffness, and swelling. (Exs. 2-1-2, 14-1, 16-1). Furthermore, only three weeks after the work event, NP Bell diagnosed a “cervical strain complicated by moderate osteoarthritis of cervical spine.” (Ex. 9-2). She also explained that claimant was not progressing in a way that she would expect from a simple cervical strain and that his osteoarthritis was contributing. (Ex. 47-7).

Moreover, although Dr. Benz and NP Bell stated that claimant’s preexisting osteoarthritis developed gradually, no medical expert opined that the combined condition, consisting of the strain and preexisting osteoarthritis (the condition at issue in this case), occurred gradually. (Exs. 45-1-2, 46-2). Rather, the medical evidence supports a conclusion that the combined condition occurred suddenly for the reasons stated above. (Exs. 2-1-2, 9-2, 14-1, 16-1, 45A-2, 47-7-9; Tr. 11). Under such circumstances, we find that claimant’s new or omitted medical condition claim for a combined neck osteoarthritis condition is appropriately analyzed as an injury, rather than an occupational disease. *See Smirnoff*, 118 Or App at 443; *Judd*, 71 Van Natta at 442 (injury standard applied where the onset of the claimed conditions arose as a result of an identifiable event).

We turn to the compensability issue. As a general rule, an injury is compensable under ORS 656.005(7)(a) if it arises out of and in the course of the employment and if the work is a material contributing cause of the injury. *Coleman v. SAIF*, 203 Or App 442, 446 (2005). When, however, an injury “combines” with a preexisting condition, the “combined condition” is compensable “only if, so long as and to the extent that the otherwise compensable injury is the

major contributing cause of the disability of the combined condition or the major contributing cause of the need for treatment of the combined condition.” ORS 656.005(7)(a)(B).

A “combined condition” consists of: (1) an otherwise compensable injury; and (2) a statutory preexisting condition. ORS 656.005(7)(a)(B); *Vigor Indus., LLC v. Ayres*, 257 Or App 795 (2013). A “combined condition” is characterized as having “two medical problems simultaneously.” *Multifoods Specialty Distrib. v. McAtee*, 333 Or 629, 636 (2002); *Luis F. Deleon*, 71 Van Natta 1421, 1421 (2019). The term “combined condition” suggests two separate conditions that combine. *Carrillo v. SAIF*, 310 Or App 8, 12 (2021) (citing *Brown v. SAIF*, 361 Or 241, 255-56 (2017)).

In *Keystone RV Co. - Thor Indus. v. Erickson*, 277 Or App 631, 633-34 (2016), the court explained that when a claimant initiates a claim for a combined condition, it is the claimant who bears the initial burden to establish that an “otherwise compensable condition” has combined with a preexisting condition “to cause or prolong disability or a need for treatment.” ORS 656.005(7)(a)(B). If the claimant meets that burden, and the employer disputes the compensability of the combined condition, it is then the employer’s burden under ORS 656.266(2) to establish that the “otherwise compensable injury” is not the major contributing cause of the claimant’s disability or need for treatment of the combined condition. *Erickson*, 277 Or App at 634; *Washington County v. Jansen*, 248 Or App 335, 344 (2012).

Here, the parties dispute what medical evidence is needed to establish a combining. Regarding combining, in *Brown*, 361 Or at 255-56, the court stated:

“First, [ORS 656.005(7)(a)(B)] refers to the joining of an ‘otherwise compensable injury’ and a preexisting condition as a ‘combined condition,’ strongly suggesting that there are two separate ‘conditions’ that combine to form the ‘combined condition’ claim. ORS 656.005(7)(a)(B). And, in fact, that is the way the courts have referred to ‘combined condition’ claims for years. *See, e.g., Luckhurst v. Bank of America*, 167 Ore. App. 11, 16-17, 1 P3d 1031 (2000) (‘[I]n order for there to be a ‘combined condition,’ there must be two conditions that merge or exist harmoniously.’); *Multifoods Specialty Distribution v. McAtee*, 164 Ore. App. 654, 662, 993 P2d 174 (1999), *aff’d*,

333 Ore. 629, 43 P3d 1101 (2002) (“[A] combined condition may constitute either an integration of two conditions or the close relationship of those conditions.”)

Here, Drs. Johansen and Benz opined that claimant had a cervical strain superimposed on preexisting osteoarthritis. (Exs. 31-10, 45-1-2, 45A-1-2, 48-8). Similarly, NP Bell opined that claimant had a cervical strain complicated by cervical osteoarthritis. (Exs. 9-2, 47-11-12). NP Bell explained that the osteoarthritis was likely contributing because claimant was not progressing in a way that she would expect from a simple cervical strain. (Ex. 47-7). NP Bell concluded that in November 2021, some of the stiffness, pain, and reduced range of motion was coming from the osteoarthritis, but that the majority of these findings were coming from the strain. (Ex. 47-8). Further, Dr. Benz stated that claimant’s neck symptoms could have been caused by the cervical strain or the preexisting arthritis because it was difficult, if not impossible, to separate them. (Ex. 48-14). Under such circumstances, the record persuasively establishes the existence of a combined condition consisting of the previously accepted neck strain and preexisting neck osteoarthritis. *See* ORS 656.005(7)(a)(B); *Erickson*, 277 Or App at 633-34; *Deleon*, 71 Van Natta at 1422 (physician’s opinion that a lumbar strain “superimposed” on preexisting degenerative disc disease supported the existence of a combined condition).

SAIF contends that the record does not establish the existence of a combined condition because no expert used the specific term “combined condition.” However, magic words are not required for a persuasive medical opinion. *See McClendon v. Nabisco Brands, Inc.*, 77 Or App 412, 417 (1986). As reasoned above, the opinions of Dr. Johansen, Dr. Benz, and NP Bell support a conclusion that claimant had two medical problems existing simultaneously (*i.e.*, the previously accepted neck strain and preexisting osteoarthritis). *See McAtee*, 333 Or at 636 (a “combined condition” is characterized as having “two medical problems simultaneously”). Under such circumstances, we find that the record establishes the existence of a combined condition. *See Benz v. SAIF*, 170 Or App 22, 25 (2000) (the Board may draw reasonable inferences from the medical evidence in the record); *Amelia A. Westling*, 60 Van Natta 2069, 2074 (2008) (finding a “combined condition” based on the substance of the evidence, despite a lack of “magic words” regarding a “combined condition.”)

SAIF also cites to *Ivan Zhiryada*, 74 Van Natta 422 (2022), asserting that “the otherwise compensable injury” cannot be the previously accepted condition (*i.e.*, the previously accepted neck strain) and that claimant must independently

establish that the work event was a material contributing cause of the disability or need for treatment of the osteoarthritis condition. However, *Zhiryada* is distinguishable. In that case, the medical evidence addressed a combined condition consisting of claimed L5-S1 disc protrusions and preexisting arthrosis. *Zhiryada*, 74 Van Natta at 423. The “otherwise compensable injury” in that case was the claimed L5-S1 disc protrusions. *Id.* Because the L5-S1 disc protrusions had not been previously accepted, it was the claimant’s burden to establish the compensability of the “otherwise compensable injury” (*i.e.*, the L5-S1 disc protrusions). *Id.*

Here, unlike in *Zhiryada*, the “otherwise compensable injury” is the previously accepted neck strain. Further, the osteoarthritis condition is the preexisting component in this case, not the otherwise compensable injury. Therefore, the instant case is similar to *Erickson* and *Johnston*, not *Zhiryada*.<sup>2</sup> See *Erickson*, 277 Or App at 633, 635 (the combined condition consisted of a previously accepted lumbar strain, *i.e.*, the “otherwise compensable injury” and preexisting spondylolisthesis); *Johnston*, 69 Van Natta at 169 (the combined condition consisted of a previously accepted lumbar strain, *i.e.*, the “otherwise compensable injury,” and preexisting spondylosis).

ORS 656.005(7)(a)(B) also references that an otherwise compensable injury combines with the preexisting condition to “cause or prolong disability or a need for treatment.” Here, Dr. Johansen opined that the work injury caused claimant’s preexisting osteoarthritis to flare up and become symptomatic. (Ex. 45A-1-2). In addition, he concluded that the arthritis “flare up” increased claimant’s disability and need for treatment and delayed his recovery. (*Id.*) Finally, considering both claimant’s neck strain and osteoarthritis, NP Bell opined that the accepted neck strain was the major contributing cause of claimant’s initial need for treatment.

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<sup>2</sup> SAIF asserts that *Erickson* is limited to those cases in which the initial claim document explicitly requests acceptance of a “combined condition.” However, *Erickson* made no such proclamation. 277 Or App at 633. Furthermore, claimant’s counsel clarified before the hearing that the claim was for a combined osteoarthritis condition. (Tr. 3, 5). In addition, as reasoned above, the medical evidence supports the application of a combined condition analysis. Under such circumstances, the record establishes that a combined condition analysis applies and that the combined neck osteoarthritis condition exists. See *Erickson*, 277 Or App at 633-34; *Johnston*, 69 Van Natta at 168-69, *recons* 69 Van Natta at 341-42 (claim properly analyzed as a combined condition where the claimant’s initial claim document did not explicitly request acceptance of a combined condition, but the medical evidence and counsel’s clarification at the hearing supported a combined condition analysis); see also *Columbia Forest Products v. Woolner*, 177 Or App 639, 647 (2001) (a notice of acceptance that does not use the specific words “combined condition” is not, for that reason alone, insufficient to constitute an acceptance of a combined condition).



(Ex. 47-11-12). In light of the foregoing, the record supports a conclusion that the otherwise compensable neck strain combined with the preexisting osteoarthritis to cause and prolong the disability or need for treatment of the combined condition. *See* ORS 656.005(7)(a)(B); *Erickson*, 277 Or App 633-34.

Having found that claimant has established the initial burden, we turn to SAIF's burden of proof under ORS 656.266(2). Although, Dr. Benz and NP Bell stated that the work event would not be the major cause of the osteoarthritis itself or cause a pathological worsening of that condition, they did not conclude that the previously accepted neck strain was never the major contributing cause of claimant's disability or need for treatment. (Exs. 45-2, 46-2); *see* ORS 656.266(2). Rather, both Dr. Benz's and NP Bell's opinions supported a conclusion that claimant's neck strain was initially the cause of claimant's disability or need for treatment. (Exs. 47-8, -11-12, 48-14); *see Braden v. SAIF*, 187 Or App 494 (2003) (the Board was not authorized to find a claim compensable for a discrete period of time at the initial claim stage, because it may not bypass statutory requirements for claim processing); *Egbert E. Smoyer*, 71 Van Natta 821, 824 n 4 (2019) (physician's opinion that the work injury caused a strain that would have resolved in a matter of weeks was insufficient to explain that the work injury was never the major contributing cause of the claimant's need for treatment).

Under such circumstances, we find that the record does not persuasively establish that the "otherwise compensable injury" (*i.e.*, the previously accepted neck strain) was never the major contributing cause of the claimant's disability or need for treatment of the combined neck strain/osteoarthritis condition. *See* ORS 656.266(2); *Erickson*, 277 Or App at 634. Consequently, SAIF has not met its burden of proof under ORS 656.266(2).

In sum, for the aforementioned reasons, we find that the record persuasively establishes that claimant's new or omitted medical condition claim for a combined neck osteoarthritis condition is compensable. *See* ORS 656.005(7)(a)(B); *Erickson*, 277 Or App at 633-34; *Johnston*, 69 Van Natta at 342. Accordingly, we affirm.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review is \$7,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issue, the

value of the interest involved, the risk that claimant's counsel might go uncompensated, and the contingent nature of the practice of workers' compensation law.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF. *See* ORS 656.386(2); OAR 438-015-0019; *Gary Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

### ORDER

The ALJ's order dated January 27, 2023, is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$7,500, payable by SAIF. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF.

Entered at Salem, Oregon on November 22, 2023